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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

DR. ERWIN D. JACKSON,

CASE NO. 2019-CA-000003

Plaintiff,

v.

CITY OF TALLAHASSEE,
a Florida municipal corporation;
JOHN DAILY,
in his official capacity as Mayor;
JEREMY MATLOW,
in his official capacity as City Commissioner;
CURTIS RICHARDSON,
in his official capacity as City Commissioner;
DIANE WILLIAMS-COX,
in her official capacity as City Commissioner;
ELAINE BRYANT,
in her purported official capacity as City
Commissioner,

Defendants.
_____/

PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Plaintiff Dr. Erwin D. Jackson, under Florida Rule of Civil Procedure 1.510, moves the Court for an entry of final summary judgment in his favor. The parties have stipulated that there are no disputed issues of material fact, and the question before the Court is a matter of law. Additionally, the parties have agreed to waive the normal time frames governing summary judgment in Rule 1.510(c) to move the matter forward on an expedited basis.

I. Introduction

Florida's Government, in the Sunshine Law, Section 286.011, Florida Statutes ("Sunshine Law"), requires that all official actions by the Defendant City of Tallahassee ("City") occur at properly noticed public meetings. In this case, the City, acting through the Tallahassee

City Commission ("Commission"), screened 93 applicants for a vacant seat on the Commission and whittled the list down to nine names for final consideration without holding a public meeting. Deciding which candidates to keep and which to reject for a public office is a quintessential governmental function. The case law is clear that the public had a right to hear from the Commissioners at a public meeting before the Commission narrowed the applicant pool to a small group of finalists. Excluding the public from this process was a Sunshine Law violation. Nevertheless, the City selected and swore Defendant Elaine Bryant ("Bryant") into office through this unlawful process. The remedy for the City's Sunshine Law violation is to declare the City's search process and appointment of Bryant void *ab initio*.

II. Stipulated Facts

The parties have stipulated to the following facts:

1. Plaintiff is an individual who resides in Tallahassee, Florida and has standing to bring this action.

2. Defendant City of Tallahassee is a municipal corporation organized and existing under Florida law.

3. The organization of the government of the City of Tallahassee is provided in the Tallahassee City Charter.

4. A true and correct copy of sections 9 through 17 of the Tallahassee City Charter are attached to the Stipulated Facts as Exhibit 1.

5. The Tallahassee City Commission is composed of a mayor and four commissioners. *See* Tall. Charter, §§ 9, 11.

6. As of November 19, 2018, the City Commission was comprised of Mayor John E. Dailey, Commissioner Jeremy Matlow, Commissioner Dianne Williams-Cox, Commissioner Curtis B. Richardson and Commissioner Scott C. Maddox.

7. Scott C. Maddox was elected to a four-year term which began in 2016 and was scheduled to run to 2020. *See* Tall. Charter, § 9 (establishing 4-year terms for members of City Commission).

8. Scott C. Maddox held City Commission Seat 1.

9. On December 11, 2018, an indictment was filed in the United States District Court of the Northern District of Florida, Tallahassee Division in the case styled as *United States of America v. Scott Charles Maddox, et al.*, case no. 18-CR-76, charging Scott C. Maddox with numerous criminal violations of the United States Code.

10. On December 12, 2018, Governor Rick Scott issued Executive Order No. 18-365 suspending Scott C. Maddox from the office of City Commissioner of the City of Tallahassee.

11. A true and correct copy of Executive Order No. 18-365 is attached to the Stipulated Facts as Exhibit 2.

12. Governor Rick Scott's suspension of Scott C. Maddox from office created a vacancy in City Commission Seat 1.

13. Section 14 of the City Charter sets out the procedure to fill a vacancy on the City Commission and provides in pertinent part:

> Any vacancy in the commission, including the office of mayor, shall be filled by appointment until the following regular municipal election . . . The term of commissioners elected to fill a vacancy shall be for the unexpired term of the position vacated. . . .
>
> If any vacancy is not filled within twenty (20) days after it shall have occurred, an appointment to fill the vacancy shall be made by the governor.

(Tall. City Charter, § 14).

14. The City Commission adopted City Commission Policy 144 to provide additional procedures to fill a vacancy on the City Commission.

15. A true and correct copy of Commission Policy 144 is attached to the Stipulated Facts as Exhibit 3.

16. Commission Policy 144 was last revised on June 10, 2009.

17. The City Commission utilized the procedures prescribed in Commission Policy 144 to fill the vacancy in City Commission Seat 1.

18. On December 12, 2018, the City posted a notice on the City's internet site (www.talgov.com) informing the public that the City was accepting applications to fill the vacancy in City Commission Seat 1 and outlining the process to fill the vacancy.

19. A true and correct copy of the December 12, 2018 notice is attached to the Stipulated Facts as Exhibit 4.

20. The application deadline for persons interested in filling the vacancy in City Commission Seat 1 was December 22, 2018.

21. On December 16, 2018, the Tallahassee Democrat newspaper published a notice informing the public that the City was accepting applications to fill the vacancy in City Commission Seat 1 and outlining the process to fill the vacancy.

22. A true and correct copy of the proof for the notice published on December 16, 2018 Tallahassee Democrat is attached to the Stipulated Facts as Exhibit 5.

23. Between December 12 and December 22, 2018, 93 city residents submitted applications to fill the vacancy in City Commission Seat 1.

24. As the applications were submitted to the City, the applications were posted on the City's internet site (www.talgov.com).

25. As the applications were received, the City Treasurer-Clerk's Office informed the members of the City Commission.

26. On December 26, 2018, in accordance with Commission Policy 144, each

member of the City Commission submitted a list of three candidates (from the pool of 93 applicants) to be considered for appointment to City Commission Seat 1.

27. Each list of three candidates was submitted to the City Treasurer-Clerk.

28. Commissioner Richardson submitted the names of the following persons to the Treasurer-Clerk: Tabitha Frazier, Saralyn Grass, and J. Byron Greene.

29. Commissioner Matlow submitted the names of the following persons to the Treasurer-Clerk: Tabitha Frazier, Howard Kessler, and Bruce Strouble.

30. Commissioner Williams-Cox submitted the names of the following persons to the Treasurer-Clerk: Tabitha Frazier, Bruce Strouble, and Elaine Bryant.

31. Mayor Dailey submitted the names of the following persons to the Treasurer-Clerk: Will Messer, Lila Jaber, and Gallop Franklin, II.

32. Commission Policy 144 provides for the allocation of points based on the number of times a candidate's name was submitted. *See* Policy 144.04(F).

33. The Treasurer-Clerk's Office assigned the points based on the submissions.

34. The points were allocated as follows:

Candidate	No. Votes
Tabitha Frazier	3
Bruce Strouble	2
Saralyn Grass	1
J. Byron Greene	1
Gallop Franklin, II	1
Lila Jaber	1
Will Messer	1
Elaine Bryant	1
Howard Kessler	1

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35. Commission Policy 144 provides that the five candidates (and ties) with the highest point totals would be placed on a list for consideration for appointment for vacant City

Commission Seat 1. *See* Policy 144.04(F).

36. Based on the point allocations, one candidate received three votes, one candidate received two votes and seven candidates tied with one vote.

37. On December 26, 2018, the City posted an announcement on the City's internet site (www.talgov.com) informing the public that nine candidates (submitted by the members of the City Commission) would be considered for appointment to fill City Commission Seat 1 at a public meeting on December 31, 2018.

38. A true and correct copy of the December 26, 2018 announcement is attached to the Stipulated Facts as Exhibit 6.

39. The City Commission did not meet between December 5 and December 31, 2018.

40. The City Commission held a public meeting on December 31, 2018.

41. A true and correct copy of the agenda for the December 31, 2018, City Commission meeting is attached to the Stipulated Facts as Exhibit 7.

42. Policy 144 states: "Nomination [for the vacancy on the City Commission] may be made only from the short list of candidates;" accordingly, the December 31, 2018, meeting agenda said that "Commissioners will make nominations from the short list of candidates."

43. A video recording of the December 31, 2018 City Commission meeting has been submitted as part of the record.

44. The nine candidates from the short list appeared at the December 31, 2018, meeting, made presentations, and responded to questions posed by members of the City Commission.

45. At the December 31, 2018, meeting, the City Commission voted to appoint Elaine Bryant to fill City Commission Seat 1.

46. Elaine Bryant was sworn into office during the December 31, 2018 City

Commission meeting.

47. On Deeember 31, 2018, the City posted an announeement on the City's internet site (www.talgov.com) informing the publie that Elaine Bryant was appointed to fill City Commission Seat 1 and had been sworn into offiee.

48. A true and eorreet eopy of the Deeember 31, 2018, announeement is attaehed to the Stipulated Faets as Exhibit 8.

III. Legal Standard for Sunshine Law Cases

The Florida Legislature enaeted the Sunshine Law "in the publie interest to proteet the publie from 'elosed door' polities and, as sueh, the law must be broadly eonstrued to effeet its remedial and proteetive purpose." *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983). It "is to be eonstrued liberally in favor of open government." *Krause v. Reno*, 366 So. 2d 1244, 1250 (Fla. 3d DCA 1979). And eonstrued in a way "so as to frustrate all evasive deviees." *Sarasota for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010) (eitations omitted).

IV. Argument

There is ample ease law diseussing the Sunshine Law, ineluding the very issue before this Court. Although the City will try, there is simply no way for it to argue around these eases. They are clear. The City's actions of sereening and eliminating 84 applieants for the position of City Commissioner eonstituted "offieial aets" under Seetion 286.011(1) that had to oeeur in the sunshine at a properly notieed publie meeting.

a) The City violated the Sunshine Law because it took "official acts" on the 93 applicants for the vacant Commission seat without holding a public meeting.

Under the Sunshine Law, "[a]ll meetings of any . . . munieipal eorporation . . . at whieh official aets are to be taken are deelared to be publie meetings open to the publie at all times." § 286.011(1), Fla. Stat. (2018); *see also* Art. I § 24(b), Fla. Const. (2018). The statute goes on to provide that "no resolution, rule, regulation or formal aetion shall be eonsidered binding" if the

governmental entity violates the Sunshine Law in enacting it. *Id.*; *see also Palm Beach v. Gradison,* 296 So. 2d 473, 478 (Fla. 1974) (emphasizing that courts must find officials acts taken in the shade void *ab initio*). Finally, the statute requires proper notice of the public meeting and the keeping of minutes. § 286.011(1)–(2), Fla. Stat.

The reasoning behind the statutory requirement that any "official acts" occur at properly noticed public meetings is important. "Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the [Sunshine Law] . . . Every step in the decision-making process, including the decision itself, is a necessary preliminary formal action. It follows that each such step constitutes an 'official act,' an indispensable requisite to 'formal action,' within the meaning of the act." *Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969) *rev'd on other grounds*, *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985).

In this case, the City Commissioners screened the 93 applicants for the vacant seat and created a list of their top three candidates, which the City Treasurer-Clerk then compiled and tabulated to produce a "short list" of nine finalists. The City admits it conducted this process without holding a public meeting. (Stipulated Facts ¶ 39). Thus, the City violated the Sunshine Law if this Court finds that the narrowing down of the list of 93 applicants to nine finalists was an "official act" under Section 286.011(1).

A review of the relevant case law shows this is not a case of first impression. At least four Florida courts have considered the issue before this Court and have uniformly held that decisions that effectively "short-list," "screen," "rank," or "weed through" submissions or applications provided to a governmental entity are official acts that must occur in the sunshine. *See Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1169 (Fla. 2d DCA 1999) (concluding

the short-listing of applicants to be formal action that was required to occur at a publicly noticed meeting); *Wood*, 442 So. 2d at 938 (holding the screening of applicants is an undisputed decision-making "official act"); *Silver Express Company v. District Board of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So. 2d 1099, 1100 (Fla. 3d DCA 1997) (finding a Sunshine Law violation where the "committee's function was to weed through the various proposals, to determine which were acceptable and to rank them accordingly"); *Krause*, 366 So. 2d at 1250 (concluding screening of applicants to provide flight training services to public college must occur at public meeting).

First, *Leach-Wells* is directly on point with respect to the City's actions here. In that case, the Bradenton City Council created a committee to screen responses to a request for proposals for a city construction contract. 734 So. 2d at 1169. The committee was to review the proposals and rank the top three firms. *Id.* Those firms would then make presentations to the City Council, which would select a winner from the short list. *Id.* However, the screening committee never held a public meeting; rather, it only sent its selections to the City Clerk who prepared a short list of the rankings. *Id.* Later, at the City Council meeting, only the three short-listed firms could make public presentations. *Id.* at 1169–70. The court said that "there is no question that the committee members' individual evaluations were tallied and acted upon, albeit by the unilateral action of the city clerk, which resulted in three bidders being selected to make presentations to the Council." *Id.* at 1171. Thus, the court concluded "that the short-listing was formal action that was required to be taken at a public meeting." *Id.*

Like the clerk in *Leach-Wells*, the Tallahassee Treasurer-Clerk "tallied and acted upon" the individual Commissioners' decisions to whittle down the 93 applicants to just nine names, resulting in the final short list, without holding a public meeting. (Stipulated Facts ¶¶ 33-34; ¶ 39). Like in *Leach-Wells*, the Commission allowed only the nine applicants on the short list to

make presentations. (Stipulated Facts ¶ 44). The same conclusion is therefore appropriate in this case, that is, the "short-listing was formal action that was required to be taken at a public meeting." *Leach-Wells,* 734 So. 2d at 1169. Because "a meeting was required and none was held a Sunshine Law violation occurred" in both cases. *Id.*

Second, the Florida Supreme Court considered a similar issue to the one here in *Wood.* 442 So. 2d at 934. In that case, the University of Florida set up a screening committee to help find a new dean for the law school. *Id.* at 936–37. Because the committee eliminated some of the applicants for the position, it made "official acts" on behalf of the university that had to occur in the sunshine at a properly noticed public meeting. *Id.* at 939–40.

That same logic applies with equal force here. The City's elimination of 84 applicants for the vacant seat constituted "official acts" under Section 286.011(1) that had to take place at properly noticed public meetings.

Third, in *Silver-Express*, the defendant, a public community college, requested proposals to supply flight training courses to its students. 691 So. 2d at 1099. The college's purchasing director appointed a committee to evaluate the proposals. *Id.* The screening committee's "function was to weed through the various proposals, to determine which were acceptable and rank them accordingly." *Id.* at 1100. It never held a public meeting while performing these tasks. *Id.* In fact, the committee did not eliminate any of the applicants from later consideration by the purchasing director. *Id.* Nevertheless, the court concluded that because "the committee's actions helped to crystalize the decision to be made by the college" and the decision "was of significance" its decision-making should have taken place in the sunshine. *Id.* (quoting *Spillis Candela & Partners, Inc. v. Centrust Sav. Bank*, 535 So. 2d 694, 695 (Fla. 3d DCA 1988)).

There are many similarities between *Silver Express* and this case. Here, like in *Silver Express*, the City Commissioners "weeded through the various" applications and "ranked them

accordingly," selecting their top three candidates. (Stipulated Facts ¶ 26). And even more compelling in this case, the City Commissioners eliminated 90% of the applicants without a public meeting whereas in *Sliver Express*, the screening committee only provided advice on the applicants. If the acts in *Silver Express* were significant enough to rise to the level of Sunshine Law violations, then there is no doubt that the City's elimination of candidates for public office was important enough to require a public meeting.

Fourth, in *Krause*, Miami's City Manager created a committee to screen applicants for Chief of Police. 366 So. 2d at 1246. The committee was to consider the applicants and recommend the names of the top four or five of the 165 applicants, although the City Manager retained the authority to appoint anyone he wanted. *Id.* The court found that the committee's act of reducing the number of applicants to four or five and forwarding those names to the City Manager constituted an official act under the Sunshine Law. *Id.*

Again, the parallels with this case are obvious. Like in *Krause*, the City Commissioners narrowed the number of applicants outside of the sunshine. And like in *Krause*, the City's narrowing of the applicant pool outside of the sunshine was improper because it was an official act under Section 286.011(1).

In sum, if the screening and elimination of applicants for a construction project, flight training services, law school dean, and police chief are official acts that had to occur in the sunshine, then surely the screening and elimination of applicants for the public office of City Commissioner are official acts that must occur in the sunshine too.

b) The City's intent is irrelevant to the legal analysis.

That the City may have misunderstood the Sunshine Law or violated it unintentionally are unimportant to the question before this Court. *See Leach-Wells*, 734 So. 2d at 1171 (explaining there was no record evidence the city council even knew it may have violated

Sunshine Law). Rather, the case law is clear that "no intent to violate is required" in a Sunshine Law case. *Id.* (citing *Gradison*, 296 So. 2d at 478).

c) The City did not "cure" the Sunshine Law violation at its December 31, 2018, public meeting.

The Florida Supreme Court has held that Sunshine Law violations can be cured only through "'independent, final action in the sunshine,' which [the Supreme Court] distinguished from mere ceremonial acceptance or perfunctory ratification of secret actions and decisions." *Sarasota Citizens,* 48 So. 3d at 765 (quoting *Tolar v. School Bd. of Liberty Cty.*, 398 So. 2d 427, 429 (Fla. 1981)).

Here, at its December 31 meeting, the City did not revisit the actions the Commissioners took outside of the sunshine in rejecting 84 of the 93 applicants. (Stipulated Facts ¶ 42 and video recording of December 31 meeting, which the parties have stipulated is part of the record). It did not discuss the 84 applicants, other than offering a general thanks to all who had applied. *Id.* It certainly did not interview or discuss anyone other than the nine finalists whom the Commissioners selected in the shade. *Id.* In sum, the Commission perfunctorily accepted its prior acts and considered only the short list applicants at the December 31 meeting. Thus, the December 31 meeting did not "cure" the prior Sunshine Law violation. *See id; Zorc v. City of Vero Beach*, 722 So. 2d 891, 903 (Fla. 4th DCA 1998) (stating that "only a full, open hearing will cure a defect arising from a Sunshine Law violation. Such violation will not be cured by a perfunctory ratification of the action taken outside of the sunshine"); *see also Port Everglades Auth. v. International Longshoremen's Ass'n, Local 1922-1*, 652 So. 2d 1169, 1171 (Fla. 4th DCA 1995) (concluding that "a 'cure' did not occur because the governmental body did not reconvene 'in the sunshine' before the contract was awarded, and the government did not conduct a full, open hearing on the competing bidders for the contract before ratifying the selection committee's recommendations"); *Spillis Candela*, 535 So. 2d at 695 (finding that the

governing body's ratification at a public meeting of a committee's report made outside the sunshine did not cure the Sunshine Law violation).

d) The City's official actions taken outside of the sunshine are void *ab initio*.

Because the City violated the Sunshine Law in conducting the search process for filling the vacancy on the Commission, its actions are void *ab initio*. *Gradison*, 296 So. 2d at 473 (holding that a "[m]ere showing that the government in the sunshine law has been violated constitutes an irreparable public injury so that the ordinance is void *ab initio*" and concluding even though a zoning ordinance had been adopted at a public hearing, it was invalid because the zoning plan upon which the ordinance was based was formulated outside the sunshine); *see also Grapski v. City of Alachua*, 31 So. 3d 193, 200 (Fla. 1st DCA 2010) (concluding a city commission's approval of minutes in violation of the Sunshine Law was null and void *ab initio*). Thus, the entire search process and swearing-in of Bryant are null and void.

V. Conclusion

Based on the foregoing, Jackson respectfully asks that this Court to enter final summary judgment in his favor and grant the relief he requested in his Verified Complaint for Declaratory and Injunctive Relief. Specifically, Jackson seeks a judgment:

a) Declaring that the City violated the Sunshine Law when it took official action on the applicants to fill the vacancy on the Commission without holding a properly noticed public meeting;

b) Declaring the Commission's selection of Bryant to fill the vacancy on the Commission void *ab initio* due to the Sunshine Law violation;

c) Declaring the City's swearing into office of Bryant null and void as a product of Sunshine Law violation;

d) Declaring all of Bryant's official acts null and void and enjoining her from taking any further acts as Commissioner;

e) Requiring the City to recoup any salary, benefits, or other compensation paid to Bryant;

f) Declaring a vacancy has existed for more than twenty days for City Commission, Seat 1;

g) Declaring that, under Section 14 of the City Charter, the Governor is to appoint someone to fill the vacancy on the City Commission;

h) Awarding Jackson attorneys' fees under Florida Statutes Section 286.011(4);

i) Assessing all costs against the City under Sections 57.014 and 86.081, Florida Statutes; and

j) Directing any other relief this Court considers proper, including but not limited to injunctive relief.

Respectfully submitted,

/s/ C.B. Upton
Charles Burns Upton II
Florida Bar No. 37241
Upton Law Firm, P.L.
1400 Village Square Blvd.
Suite 3-276
Tallahassee, FL 32312-1250
Telephone: (850) 792-5291
Primary Email: cbu@uptonfirm.com
Secondary Email: service@uptonfirm.com

Attorney for Plaintiff Dr. Erwin D. Jackson

CERTIFICATE OF SERVICE

I certify that on January 11, 2019, a copy of the foregoing was served via the Florida E-Filing Portal on the following:

Louis C. Norvell, Esq.
City of Tallahassee
300 South Adams Street, Box A-5
Tallahassee, FL 32301
Email: Louis.norvell@talgov.com
Attorney for Defendants

Ronald G. Meyer, Esq.
Meyer, Brooks, Demma and Blohm, P.A.
131 North Gadsden Street
Tallahassee, FL 32301
Email: rmeyer@meyerbrookslaw.com
Attorney for Defendants

/s/ C.B. Upton
Charles Burns Upton II